

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MANUEL ENRIQUEZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket No. 196,942
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent requested review of the Award dated December 30, 1996, entered by Assistant Director Brad E. Avery. Appeals Board Member Gary Korte recused himself from this proceeding and Jeff Cooper of Topeka, Kansas, was appointed Appeals Board Member Pro Tem.

**APPEARANCES**

Gary L. Jordan of Ottawa, Kansas, appeared on behalf of the claimant. Tina M. Sabag of Dakota City, Nebraska, appeared on behalf of the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Assistant Director awarded claimant benefits based upon an 80 percent permanent partial general disability. Respondent requested the Appeals Board to review the issues of (1) average weekly wage, (2) nature and extent of injury and disability, and

(3) claimant's entitlement to future medical treatment. Those are the only issues before the Appeals Board on this review.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be affirmed to award claimant permanent partial general disability benefits based upon a 12.75 percent functional impairment rating through August 20, 1995, and thereafter permanent partial disability benefits based upon an 80 percent work disability.

The Assistant Director's analysis of the facts and the conclusions reached as a result of that analysis is appropriate and is hereby adopted by the Appeals Board as its own.

Claimant's medical expert witness, Edward J. Prostic, M.D., testified claimant developed scapulocostal syndrome as the result of repetitive traumas to his right shoulder and neck. Dr. Prostic testified claimant should not lift more than 25 minutes per hour during an eight-hour work day; should not reach or work above shoulder level more than 25 minutes per hour not to exceed two hours per day; should limit lifting to 10 or 20 pounds; and limit all other lifting, carrying, pulling, pushing, and reaching without regard to height. Sergio Delgado, M.D., on the other hand, testified claimant should limit all activity which was either at or above shoulder level or which was repetitive. Both doctors limited their restrictions to claimant's right upper extremity.

Because his is an "unscheduled" injury, K.S.A. 44-510e governs claimant's right to permanent partial disability benefits. That statute provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

During the period claimant returned to work for the respondent and worked at an accommodated light-duty job, the Appeals Board finds claimant earned a wage which was within 90 percent of the average weekly wage he was earning on the date of accident. Therefore, claimant's permanent partial disability benefits are limited to the stipulated percentage of functional impairment of 12.75 percent through his last day of work on or about August 20, 1995. However, after respondent terminated claimant, he was no longer earning 90 percent of his former average weekly wage and, therefore, not precluded from receiving benefits based upon a work disability.

Because respondent did not offer claimant an accommodated position after it discontinued the light-duty position it provided claimant for approximately one year, the Appeals Board finds the public policy considerations set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), limiting the worker to functional impairment are not applicable here.

Respondent also argued that claimant refused to cooperate with it in finding accommodated employment. The Appeals Board disagrees. To the contrary, the Appeals Board finds that in August 1995 respondent advised claimant there was no other job for him at the plant. When in December 1995 claimant was unable to meet with respondent's vocational rehabilitation counselor to discuss possible accommodations, respondent refused to reschedule the appointment and took that opportunity to terminate claimant despite his requests to reschedule the meeting for another time. Claimant's termination "for cause" may have been pursuant to respondent's policies and procedures, but it does not invoke the public policy considerations relied upon by the Court of Appeals in Foulk.

The Appeals Board has carefully reviewed and considered claimant's work tasks which he performed during the 15-year period before the August 30, 1994, work-related accident and the doctors' testimony concerning those tasks. The Appeals Board finds claimant can no longer perform the following job tasks as a result of that accident: (1) reaching above the right shoulder to cut tongues, (2) reaching up with the right arm to remove skin from the hind leg, (3) reaching up with the right arm to chain the hind leg, (4) use both arms to cut off the cow's head with a knife, (5) use both arms to hang the cow's severed head on a hook, and (6) operating a hide puller to skin the cow's carcass. Therefore, claimant has established he is now unable to perform six of ten, or 60 percent, of his former work tasks as a result of the work-related accident.

The Appeals Board's conclusion concerning tasks loss is based upon the description of the tasks as provided by claimant and his former supervisor, Steve Morgan, as well as the testimony of both Drs. Prostic and Delgado. As indicated by the doctors, claimant's ability to perform certain tasks was dependent upon several factors, including the height at which the task was performed, the force and speed at which the task was accomplished, the repetitiveness of the task, the weight involved, and whether reaching was required.

As did the Assistant Director, the Appeals Board also finds claimant's average weekly wage on the date of accident was \$481.52 as indicated in the report of witness Monty Longacre. Claimant did not testify as to his average weekly wage on the date of accident and respondent did not introduce a wage statement before the record was closed. However, Monty Longacre's report dated September 25, 1995, shows claimant's average weekly wage was comprised of \$415.20 regular time, \$18.51 overtime, \$7.15 bonus, and \$40.66 of additional items. Despite actively seeking employment, claimant has been unable to obtain a job and, therefore, the difference between his pre- and post-injury average weekly wage is 100 percent.

Averaging the 60 percent tasks loss with the 100 percent difference in pre- and post-injury average weekly wage, the Appeals Board finds claimant has sustained an 80 percent permanent partial general disability for which he is entitled to receive permanent partial disability benefits commencing August 21, 1995.

The Appeals Board finds claimant is entitled to request additional medical care and treatment upon proper application to the Director.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated December 30, 1996, entered by Assistant Director Brad E. Avery should be, and hereby is, affirmed as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Manuel Enriquez, and against the respondent, IBP, Inc., for an accidental injury which occurred August 30, 1994, and based upon an average weekly wage of \$481.52 for 50.71 weeks of permanent partial disability benefits at the rate of \$319 per week or \$16,176.49, for a 12.75% whole body functional impairment, followed by 262.77 weeks of permanent partial disability benefits at the rate of \$319 per week commencing August 21, 1995, or \$83,823.51, for an 80% permanent partial general disability, making a total award of \$100,000.

As of June 5, 1997, there is due and owing claimant 50.71 weeks of permanent partial disability compensation at the rate of \$319 per week in the sum of \$16,176.49 followed by 93.58 weeks at the rate of \$319 per week in the sum of \$29,852.02 for a total of \$46,028.51, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$53,971.49 is to be paid for 169.19 weeks at the rate of \$319 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders of the Assistant Director to the extent they are not inconsistent with those above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS  
Tina M. Sabag, Dakota City, NE  
Brad E. Avery, Assistant Director  
Philip S. Harness, Director